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In the Supreme Court of the United States

October Term, 1969

No. 843

INVESTMENT COMPANY INSTITUTE, ET AL., PETITIONERS

v.

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 51a–94a) is reported at 274 F. Supp. 624. The opinion of the court of appeals (Pet. App. 1a–50a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1969, and a timely petition for rehearing was denied on August 15, 1969. The petition for a writ of certiorari was filed on November 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the operation of commingled managing agency investment accounts under regulations promulgated by the Comptroller of the Currency is within the fiduciary powers granted national banks (12 U.S.C. 92a) and consistent with the prohibitions of the Glass-Steagall Act against bank involvement in the securities business (12 U.S.C. 24, 78, 377, 378).[1]

STATUTES AND REGULATION INVOLVED

Sections 16, 20, 21 and 32 of the Glass-Steagall Act, as amended (12 U.S.C. 24, 377, 378 and 78); 12 U.S.C. 92a; and Regulation 9 of the Comptroller of the Currency (12 C.F.R. 9), are set out in pertinent part in Appendix E to the petition (Pet. App. 95a–106a).

STATEMENT

Petitioners, an association of mutual funds, investment advisers and underwriters, and certain members of that association, seek to invalidate regulations of the Comptroller of the Currency (12 C.F.R. 9.18), which permit national banks to operate commingled managing agency investment accounts on specified terms. In particular, they seek to enjoin the Comptroller from permitting the respondent First National City Bank to operate such an account.

A national bank with a trust department is authorized "to act as trustee, executor, administrator, registrar * * *, guardian * * *, assignee, receiver, * * * or in any other fiduciary capacity in which State banks,

[1] In the event that the petition should be granted, the Comptroller reserves the right to urge, as an alternative basis for affirmance, that petitioners lack standing to sue.

trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located" (12 U.S.C. 92a). The Federal Reserve Board, which administered this statute from 1913 until 1962,[2] allowed national banks holding trust funds or pension, profit-sharing, or stock bonus plan funds to pool such funds together when authorized to do so by the governing instrument or by local laws.[3] The commingling of such funds allowed sharing of administration expenses among the funds so pooled, thus reducing the service and management fees charged by the bank to each individual fund, and also allowed the diversification of assets required for a sound investment program (J.A. 214–215).

Another longstanding fiduciary service authorized by 12 U.S.C. 92a is the "managing agency," under which the bank buys, sells and holds common stock and other securities for the account of a customer pursuant to an agreement making the bank the customer's agent.[4] Before 1962 the Federal Reserve Board did not permit such managing agency funds to be pooled and administered together, and thus it was not economically feasible for a bank to accept a managing agency account of less than $100,000 because the cost of managing a smaller account was not covered by

[2] During this period this statute was found at 12 U.S.C. 248(k).

[3] See 1937 Fed. Reserve Bull. 392; 20 F.R. 3305 (1955).

[4] See J.A. 214; 1934 Fed. Res. Bull. 609; 1 Scott, *Trusts* (3d ed.) § 8.1. pp. 80–81. 12 U.S.C. 24 Seventh provides in part that national banks may deal in securities and stock "upon the order, and for the account of, customers * * *."

the usual charge of approximately one-half of one percent annually (J.A. 214–215, 221–222).

In 1962 Congress transferred the supervision of the trust activities of national banks from the Federal Reserve Board to the Comptroller of the Currency. 76 Stat. 668. The Comptroller thereafter requested all affected banks to submit recommendations as to how the then existing fiduciary regulations might be improved (J.A. 213). The response was voluminous, and the Comptroller appointed a committee of experts to study those regulations and recommend revisions (*ibid.*; 42 Trust Bulletin No. 6, p. 10 (1963)). Based upon this committee's recommendations, new regulations were proposed, and among them was a proposed authorization for the pooling and collective investment of funds held by banks in the capacity of managing agent (J.A. 216; 28 F.R. 1111 (1963)).[5] After receiving and considering comments, including those of the petitioner Investment Company Institute, the Comptroller promulgated a new set of regulations to govern the trust activities of national banks (12 C.F.R., Part 9), and these regulations included authorization, on specified terms, for the collec-

[5] The Federal Reserve Board had been considering a similar authorization for some time before the supervision of trust activities was transferred to the Comptroller, but the Board "had not come to the conclusion that this was a desirable thing at the time the transfer was made." Testimony of Chairman Martin, Hearings on H.R. 8499 and H.R. 9410 before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., p. 108 (1964).

tive investment of managing agency funds (12 C.F.R. 9.18(a)(3)).

The Securities and Exchange Commission also considered such commingled accounts from its regulatory viewpoint, and concluded that—in addition to the protections enumerated in the Comptroller's regulations and further provided by his regular bank examinations—bank customers participating in such accounts should also be protected under the Investment Company Act of 1940 and the Securities Act of 1933. Thus, it concluded that, for S.E.C. purposes, a commingled account should be treated as an investment company and the participants should be given certificates of interest registered with the Commission as securities (see J.A. 217). The addition of these S.E.C. regulatory requirements created some technical inconsistencies with the Comptroller's regulations. For example, the Comptroller required a bank administering such a collective investment fund to have "the exclusive management thereof" (12 C.F.R. § 9.18(b)(12)); but the Investment Company Act contemplated governance by a board of directors, a majority of whom could not be affiliated with the managing bank (see 15 U.S.C. 80a-10 (b)(3), (c)). Similarly, the Comptroller's regulations prohibited the issuance of any certificate or other document "evidencing a direct or indirect interest in such fund" (12 C.F.R. 9.18(b)(13)), while the Securities Act required certificates to be issued and registered with the S.E.C.

The respondent First National City Bank prepared a plan for a commingled managing agency account

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which the Bank believed would satisfy all of the various pertinent regulatory requirements. A customer with $10,000 or more [6] which he wished to be managed by the Bank would execute a written agreement appointing the Bank managing agent and specifically authorizing the customer's funds to be commingled with those of other customers signing similar agreements (J.A. 181). The customer would receive a document stating the number of "units of participation" he held as an undivided interest in the pooled fund (J.A. 152). The fund would be governed by a committee of five persons elected annually by the participants; the original committee would include three officers of the Bank, and it was contemplated that a majority of the committee would continue to be Bank officers (J.A. 115, 176, 177–178, 229). The Bank was to be the investment adviser to the collective fund and the custodian of its assets; for purposes of the securities laws, the Bank would also be considered to be an underwriter of the units of participation (J.A. 119–123, 154–165). The units of participation would be registered with the S.E.C. as securities (see J.A. 108–151) and a prospectus made available to potential investors (see J.A. 168–180).

This plan was filed with and found satisfactory by the three federal agencies concerned. The Comptroller found that the Bank would be exclusively responsible

[6] This $10,000 minimum is not required by the Comptroller's regulation. The Comptroller's Office advises us that one national bank has submitted to the Comptroller and the S.E.C. for approval a collective investment fund, similar to the one here involved, with a $5,000 minimum, and another national bank is actively considering a $2,500 minimum.

for the operation of the collective investment fund and would administer it just as it would any other trust service. The Comptroller therefore granted to the fund a specific approval under 12 C.F.R. 9.18(c)(5), thus allowing the fund to be established with some modifications of the pattern set forth in 12 C.F.R. 9.18 (J.A. 220–232). The Federal Reserve Board likewise viewed the fund as a part of the Bank for purposes of the banking laws, and therefore ruled that the participation of Bank officers on the committee of the fund would not be an affiliation with an issuer of or dealer in securities prohibited by Section 32 of the Glass-Steagall Act, 12 U.S.C. 78 (see 12 C.F.R. 218.111).[7] The S.E.C. found that the Comptroller's regulations provided sufficient protection to participants in the collective investment fund to justify the granting of certain exemptions from the Investment Company Act that would, *inter alia,* permit a majority of the account's governing board to be Bank officers.[8]

In accordance with the approval granted by these

[7] With respect to the question whether Section 21 of the Glass-Steagall Act applies, the Board's ruling "expressed no position," explaining that "since section 21 is a criminal statute, the Board has followed the policy of not expressing views as to its meaning." 12 C.F.R. 218.111(k).

[8] See Hearings on S. 2704, Collective Investment Funds, before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., pp. 81–90 (1966).

In another phase of the attack by the mutual fund industry against alleged encroachment by banks, the National Association of Securities Dealers, Inc. (NASD), intervened before the Securities and Exchange Commission to oppose the granting of exemptions from the Investment Company Act. Having been unsuccessful before the Commission, the Association petitioned for review in the court below. In an opinion consolidated with the opinion in this case, the court of appeals held that the

three federal agencies, the Bank established a commingled managing agency account in 1966 and that account is now in operation (J.A. 226–227). Petitioners then brought this action for declaratory and injunctive relief, seeking to have the Comptroller's regulations declared unlawful and the continued operation of the Bank's plan prohibited.

The district court granted petitioner's motion for summary judgment, holding that "the provisions of Regulation 9 which allow commingling of managing agency accounts do not comply with the statutory provision [*sic*] of the Glass-Steagall Act and are, therefore, illegal" (Pet. App. 93a). The court of appeals unanimously reversed (Pet. App. 2a–3a). In a brief *per curiam* opinion, the court stated that, "[o]n the merits, we are agreed that the actions taken by the Securities and Exchange Commission and the Comptroller are fully consonant with the statutes committed to their regulatory jurisdictions" (Pet. App. 3a). The members of the panel went on to elaborate their views in separate concurring opinions, one by Chief Judge Bazelon and another by Judge Burger, with whom Judge Miller joined.

Chief Judge Bazelon's opinion discussed in detail each of the aspects of the case (Pet. App. 4a–25a), and concluded that "the [commingled managing agency] Account, subject to the mutually reinforcing regulations imposed by the Comptroller and the Com-

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Commission had been correct in granting the exemptions (Pet. App. 17a–25a). The NASD has filed a petition for a writ of certiorari with respect to that decision below (No. 835, this Term), and the Solicitor General is filing a separate response thereto on behalf of the S.E.C.

mission, was established in accordance with law" (Pet. App. 4a). Judge Burger's majority concurring opinion expressed the view that (Pet. App. 49a–50a):

> Our review function is narrow and limited; it does not include the power to decide whether the public will be better served by one or the other modes of investing funds so as to achieve diversification, yield, safety or low cost. All that is the primary responsibility of the special regulatory bodies established by Congress for that purpose. * * *
>
> Here the Comptroller of the Currency, after study, has decided that the commingled managing agency account is a function which is authorized by law for banks and is in the public interest; the Securities and Exchange Commission and the Federal Reserve Board have approved. Other state and federal regulatory bodies are in accord. The regulatory bodies charged by Congress with these large responsibilities have construed the grant of power and with their accumulated expert experience have decided these issues. Their decisions are entitled to substantial deference and on this record I see no basis for disturbing their conclusions.

Consequently, Judges Burger and Miller were also of the view that the district court's judgment should be reversed on the merits.[9]

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[9] While Judges Burger and Miller expressed their "grave doubts" as to petitioners' standing to maintain the action, they nevertheless decided to resolve those doubts in petitioners' favor (Pet. App. 49a). Judge Bazelon was of the view that petitioners have standing (Pet. App. 25a–37a).

ARGUMENT

The decision of the court of appeals is manifestly correct (putting the question of standing to one side), and there is no claim of a conflict with any other decision. Consequently, there is no reason for further review.

1. As the majority concurring opinion below pointed out, "[i]n one form or another banks have been holding, managing and investing funds for customers for a long time" (Pet. App. 50a). For example, at least since 1934 when the Federal Reserve Board and the Comptroller of the Currency gave their specific approval, national banks have acted as managing agents for the purpose of buying, selling, and holding common stock or other securities for the account of individual bank customers pursuant to an agreement making the bank the customer's agent (see p. 3, *supra*). In addition, national banks have managed trust accounts possessing securities since 1915 (38 Stat. 262; 1 Fed. Reserve Bull. 43 (1915)) and, since 1937, have been permitted to commingle the assets of such accounts and to administer them in a common trust fund (see p. 3, *supra*).[10] Petitioners do not, and cannot, object to the legality of these longstanding bank services.

There is nothing novel either in the concept or in the practical operation of a commingled managing agency investment account. It is designed simply to

[10] In fact, such funds were approved as early as 1927 by the Comptroller and the Federal Reserve Board. See the description of the Security National Bank Bond Investment Trust in Saxon and Miller, *Common Trust Funds*, 53 Geo. L.J. 994, 997 (1965).

make available to the smaller investor (in this case one with $10,000 to invest) the benefit, previously available only to large investors through individual managing agency accounts, of having their investments managed by a bank trust department. Indeed, since the bank acts as a fiduciary in managing the commingled investment account, there is no practical distinction, in the bank's activities, from the management of a common trust fund.

Petitioners' objection that a national bank may not utilize a commingled managing agency account to provide the same services it has long been permitted to offer to both large investors (through individual accounts) and smaller investors (through common trust funds) is premised entirely upon the proposition that the "units of participation" represented by a certificate that First National City Bank gives each participant amount to "securities" within the meaning of the Glass-Steagall Act. Specifically, they point to Sections 16, 20, 21 and 32 of that Act, 12 U.S.C. 24, 377, 378 and 78, which limit banks to purchasing and selling "securities" only for the account of customers and prohibit direct or indirect affiliations between banks and issuers, underwriters, sellers or distributors of "securities." But the issuance of the certificates that petitioners now call "securities" is not an inherent aspect of a bank's operation of a collective managing agency account. Indeed, the Comptroller's basic regulations prohibited the issuance of any such certificates and the only reason for their existence—and the Comptroller's special permission therefor—is the S.E.C.'s determination that participants in such

accounts should be afforded additional protections under the Investment Company Act of 1940 and the Securities Act of 1933. The certificates (which are not transferable) do no more than indicate the amount of undivided interest each participant has in the commingled account (J.A. 152). The fact that the S.E.C. requires, for its own regulatory purposes, that such certificates be issued and registered under the Securities Act is plainly irrelevant to the question whether the operation of the account amounts to doing a prohibited "securities" business within the meaning of the Glass-Steagall Act.

The court below properly found no conflict between the operation of a commingled managing agency account and the purposes of the Glass-Steagall Act. As Judge Bazelon explained in his concurring opinion, the limitations upon securities dealings by banks were addressed to three problems (Pet. App. 12a):

> (1) Banks commonly invested their own assets in securities, risking commercial and savings deposits if the securities declined in value.
>
> (2) Direct bank investment in securities created pressure for banks to make unsound loans to maintain the price of securities or the financial position of companies in which the bank had holdings.
>
> (3) Large city banks frequently acted as issuers, or underwriters of blocks of securities, distributing them at a profit through correspondent country banks. The banks' pecuniary interest in the ownership, price, or distribution

> of securities created incentive to steer customers into investing in what the banks had to sell. [Footnotes omitted.]

Judge Bazelon went on to review each of these concerns and determined that the dangers envisioned by Congress are not present in the operation of a commingled investment account. This is because the bank involved does not invest any of its own (*i.e.*, its depositors') money in the securities purchased by the commingled fund [11] and the bank sells nothing but the same investment advice available through its other trust services (and from which it receives only a clearly disclosed management or advisory fee). In short, Congress did not intend by the Glass-Steagall Act to prohibit banks from giving investment advice to their customers through their trust departments, and that is basically all that is involved here.

Petitioners' argument is fundamentally circular. Although the basic bank activity here in question is entirely consistent with the purposes of the Glass-Steagall Act, they contend that the addition of the wholly separate requirements of the securities laws (resulting in the issuance of "securities") creates a situation in which the activity violates the technical language of that Act. But for the securities laws, however, there would be no document that petitioners could call a "security" in the terms of the Glass-Steagall Act. It is simply a nonsequitur to say that the securities laws can convert a commingled man-

[11] The Comptroller prohibits a bank administering a collective investment fund from having any direct interest in such a fund. 12 C.F.R. 9.18(b)(8)(i).

aging agency account into something that is illegal under the banking laws.

In any event, there is no substance to petitioners' contention that the definition of the term "securities" as used in the Securities Act of 1933 should be carried over to the administration of the Glass-Steagall Act. We submit that the conclusion of Judge Bazelon on this point is inescapable (Pet. App. 11a–12a):

> The words security and underwriter in the Securities Act of 1933 are terms of art with a high gloss. Their expansive definitions under the Securities Act cannot be imported wholesale into the Glass-Steagall Act when the two statutes serve different purposes, in different contexts of risk to the public. The securities laws are intended to protect investors, primarily through disclosure requirements. Their terms have been interpreted broadly to afford their protection to purchasers of all manner of investment interests, wherever it is needed. The Glass-Steagall Act, by contrast, was enacted to protect bank depositors and the banking system from the risk of insolvency incident to widespread investment of banks' assets in speculative securities during the twenties. * * *

It should be noted in this connection that acceptance of petitioners' unsupported assertion that the term "securities" must be given the same meaning for the purpose of all statutes—in total disregard of differing legislative objectives—would outlaw not merely commingled managing agency accounts. The definition of "security" in the Securities Act of 1933, 15 U.S.C. 77b, is sufficiently broad to include many banking

transactions such as the issuance of a savings and loan association passbook (*Tcherepnin* v. *Knight*, 389 U.S. 332) and the sale by a bank of a loan participation (*Lehigh Valley Trust Co.* v. *Central National Bank of Jacksonville*, 409 F. 2d 989 (C.A. 5)). While, because of special exemptions in the securities laws, these documents need not be registered with the S.E.C., nevertheless they are "securities" for the purposes of those laws and thus under petitioners' theory could not be issued by a banking institution because of the proscriptions of the Glass-Steagall Act. Surely Congress did not intend any such result to flow from the enactment of that statute.[12]

2. Once it is determined that the operation of commingled managing agency accounts is thus consistent with the applicable statutes, it is apparent that the complex questions remaining about their appropriateness in general and the circumstances and conditions under which they should be permitted are questions

[12] Petitioners devote little attention in the petition to their contention below that the commingled managing agency account is not authorized by 12 U.S.C. 92a, which confers fiduciary powers upon national banks. In any event, the contention is without merit. It is clear that the Bank is acting in a "fiduciary capacity" within the meaning of that Section, as the Comptroller found. See *Brown* v. *Christman*, 126 F. 2d 625 (C.A.D.C.); *Restatement of Agency* (Second), §§ 13, 14B and comment a; 1 Scott, *Trusts* (3d ed.) § 8. Moreover, there is no question but that the activity here in question is open to competing state banks under New York law, as required by 12 U.S.C. 92a. New York Banking Law, § 100-c; *Brooklyn Trust Co.* v. *Corwin*, 5 F. Supp. 287, 289 (E.D. N.Y.). And the New York State Banking Department has given its formal sanction to the commingling of managing agency accounts in New York (Pet. App. 8a). Therefore, no serious question can be raised concerning a violation of 12 U.S.C. 92a.

for the federal agencies involved, subject to Congressional supervision. The Comptroller of the Currency, the Federal Reserve Board and the Securities and Exchange Commission have each studied this matter at great length and have found the commingled managing agency account established by First National City Bank to be a proper and useful activity for that bank. The Comptroller and the S.E.C. have continuing regulatory supervision over the account. Each of these three agencies has testified at length before Congressional committees concerning these matters,[13] and each house of Congress has demonstrated its awareness of the problems by passing bills dealing with the subject.[14]

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[13] Hearings on S. 34 and S. 296, Investment Company Amendments Act of 1969, before the Senate Committee on Banking and Currency, 91st Cong., 1st Sess., pp. 5, 27, 41, 288 (1969); Hearings on H.R. 14742, Bank and Insurance Company Collective Investment Funds and Accounts, before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 90th Cong., 2d Sess., pp. 20, 112 (1968); Hearings on Amendment No. 438 to S. 1659, Mutual Fund Legislation of 1967, before the Senate Committee on Banking and Currency, 90th Cong., 1st Sess., pp. 1226, 1228, 1296 (1967); Hearings on S. 2704, Collective Investment Funds, before a Subcommittee of the Senate Committee on Banking and Currency, 89th Cong., 2d Sess., pp. 24, 130, 132 (1966); Hearings on H.R. 8499 and H.R. 9410, Collective Investment Funds, before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 88th Cong., 2d Sess., pp. 8, 22, 103 (1964); Hearings on Common Trust Funds—Overlapping Responsibility and Conflict in Regulation, before a Subcommittee of the House Committee on Government Operations, 88th Cong., 1st Sess., pp. 3, 32 (1963).

[14] S. 2224, passed by the Senate on May 26, 1969, apparently specifically authorizes operation of the commingled managing

For these reasons, the majority concurring opinion properly placed considerable reliance upon the judgment of the "regulatory bodies charged by Congress with these large responsibilities" of supervising banks and protecting investors (Pet. App. 50a). See *Unemployment Compensation Commission* v. *Aragon*, 329 U.S. 143, 153–154; *Inland Waterways Corp.* v. *Young*, 309 U.S. 517, 524. The courts should not interfere with their judgment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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agency account here involved, while H.R. 6778, passed by the House of Representatives on November 5, 1969, apparently specifically prohibits the operation of such an account.

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